U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15764080

Date: APR. 22, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, a software consulting company, sought to employ the Beneficiary as a computer and information systems manager.[1] The company requested her classification under the second-preference, immigrant category for members of the professions holding advanced degrees or their equivalents. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

After initially granting the filing, the Director of the Texas Service Center revoked the petition's approval. The Director concluded that he erred in approving the petition, finding that the Petitioner did not demonstrate the Beneficiary's possession of the minimum employment experience required for the offered position or the requested immigrant visa classification.

The Petitioner appeals the decision and, in these revocation proceedings, bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence.[2] *See Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988) (citation omitted) (regarding the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (regarding the standard of proof). Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer must obtain DOL certification. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position.

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[1] The Petitioner's Form I-140 identifies the offered position as "47-Engineer-specialty not list." But we will refer to the position as computer and information systems manager, the job title listed on the accompanying certification from the U.S. Department of Labor (DOL).

[2] Counsel states that both the Petitioner and the Beneficiary appeal the revocation decision. The Beneficiary requested to "port" to a new job, and USCIS found her eligible for portability under section 204(j) of the Act, 8 U.S.C. § 1154(j). The Beneficiary therefore qualifies for treatment as an "affected party" in these proceedings. *See Matter of V-S-G- Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017). The Beneficiary, however, signed neither the Form I-290B, Notice of Appeal or Motion, nor Form G-28, Notice of Entry of Appearance. Because the record does not indicate the Beneficiary's authorization of the appeal's filing, we will not recognize her as an appellant.

Id. Labor certification also signifies that employment of a noncitizen will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa classification. Finally, if USCIS grants a petition, a designated noncitizen may apply for an immigrant visa abroad or, if eligible, "adjustment of status" in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

"[A]t any time" before a beneficiary obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by a record, the erroneous nature of a petition's approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

USCIS may issue a notice of intent to revoke (NOIR) a petition's approval if the unexplained and unrebutted record at the time of the notice's issuance would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). If a NOIR response does not rebut stated revocation grounds, USCIS properly revokes a petition's approval. *Id.* at 451-52.

II. THE REQUIRED EXPERIENCE

The Petitioner does not challenge the Director's finding of insufficient evidence of the Beneficiary's qualifying experience for the offered position and the requested immigrant visa classification. Rather, the company asserts that the Act otherwise bars revocation of the petition's approval.

If a petitioner on appeal does not challenge a revocation ground, we ordinarily do not review it. *See Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009) (finding that issues not presented on appeal are deemed to be "waived") (citation omitted). But we cannot sustain a petition's revocation if a corresponding NOIR does not properly allege facts that would have warranted the filing's denial. *See Matter of Estime*, 19 I&N Dec. at 451-52.

> Where a notice of intention to revoke is based on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, revocation of the visa petition cannot be sustained, even if the petitioner did not respond to the notice of intention to revoke.

Id. at 452.

The Director issued two NOIRs, both alleging insufficient evidence of the Beneficiary's experience for the offered position and the requested immigrant visa classification. We will therefore review the sufficiency of the allegations in both NOIRs.

Advanced degree professionals must hold "advanced degrees or their equivalents." Section 203(b)(2)(A) of the Act. The term "advanced degree" means:

> any United States academic or professional degree or a foreign equivalent degree above that of a baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

8 C.F.R. § 204.5(k)(2).

A petitioner must also demonstrate a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date.[3] *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). When assessing a beneficiary's qualifications for an offered position, USCIS must examine the job-offer portion of an accompanying labor certification to determine the position's minimum job requirements. USCIS may neither ignore a certification term nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.3d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

The Director found the minimum, primary job requirements of the offered position of computer and information systems manager to include a U.S. master's degree, or a foreign equivalent degree, in computer science, engineering, mathematics, electronics, business administration, or "any field of study." The labor certification indicated a need for neither training nor experience. The certification also stated the Petitioner's acceptance of an alternate combination of education and experience: a bachelor's degree followed by five years of experience.[4]

The Petitioner seeks to qualify the Beneficiary for the offered position and the requested immigrant visa classification based on her purported possession of a bachelor's degree and at least five years of progressive, post-baccalaureate experience. The Beneficiary's educational qualifications are not at issue.

On the labor certification, the Beneficiary attested that, before the petition's priority date in August 2009 and her start date of employment with the Petitioner in July 2008, she gained more than five years of full-time, qualifying experience.[5] She stated the following experience:

- About one year, six months as a software engineer with a U.S. consulting company, from January 2007 to July 2008;

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[3] This petition's priority date is August 25, 2009, the date DOL accepted the Petitioner's labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

[4] The plain language of the labor certification states the position's primary requirements as a master's degree, plus five years of experience as an engineer, analyst, programmer, consultant, lead, or manager, with alternate requirements of a bachelor's degree plus five years of experience. The Director, however, interpreted the requirements as a master's degree with no experience, or a bachelor's degree plus five years of experience. The Director apparently found that the Petitioner inadvertently conflated the primary and alternate experience requirements on the labor certification application.

[5] A labor certification employer cannot rely on experience that a noncitizen gained with it, unless the noncitizen gained the experience in a position substantially different than the offered one or the employer can demonstrate the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3). At the time of the first NOIR's issuance in September 2019, the Petitioner did not claim that the Beneficiary gained qualifying experience with it, nor did it submit evidence of such experience.

- About one year, seven months as a software analyst with an Indian software development firm, from September 2005 through March 2007;
- About one year, three months as a lab programmer for an Indian college, from June 2004 to September 2005; and
- About one year, one month as a software developer for another Indian software development firm, from March 2003 to April 2004.

To establish claimed, qualifying experience, a petitioner must submit letters from a beneficiary's former employers. 8 C.F.R. § 204.5(g)(1). The letters must contain the employers' names, addresses, and titles, and descriptions of the beneficiary's experience. *Id.*

A. The First NOIR

At the time of the first NOIR's issuance in September 2019, the record contained letters from the three most recent former employers of the Beneficiary. As the NOIR alleges, the letters do not establish the Beneficiary's possession of the requisite five years of experience. Together, the letters indicate her employment from June 2004 through July 2008, only about four years, one month of experience. The NOIR also notes that, contrary to 8 C.F.R. § 204.5(g)(1), the letter from the Indian college does not describe the Beneficiary's experience. Thus, the record at the time of the first NOIR's issuance established the Beneficiary's possession of less than three years of qualifying experience.

The NOIR further notes discrepancies in the Beneficiary's claimed dates of employment at the U.S. consulting company. The company's letter and the labor certification state the company's employment of the Beneficiary from January 2007 to July 2008. But on Form G-325A, Biographical Information, which the Beneficiary submitted with her 2012 application for adjustment of status, she attested that the company employed her from October 2007 to September 2008. The discrepancies in the employment dates cast additional doubts on the Beneficiary's claimed experience with the company. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies).

For the foregoing reasons, the record at the time of the first NOIR's issuance did not demonstrate the Beneficiary's possession of the minimum experience required for the offered position or the requested immigrant visa classification. Thus, on this ground, USCIS properly issued the first NOIR.

B. The Second NOIR

The Director issued the second NOIR in February 2020. At that time, the record contained additional evidence that the Petitioner had submitted in response to the first NOIR. In an affidavit, the Beneficiary attested that she began working for the U.S. consulting company in October 2007, not January 2007 as listed on the labor certification and in the company's letter. The Petitioner and Beneficiary asserted that she provided her employment dates to the Petitioner in the dd/mm/yr format commonly used in her home country of India, not in the mm/dd/yr format usually used in the United States. Thus, they claimed that the labor certification inadvertently indicates a start date of January 10, 2007 (01/10/2007), rather than the correct date of October 1, 2007 (10/01/2007). Also, they contended that, rather than verifying the Beneficiary's dates of employment in its own records, the U.S. consulting company drafted its letter using the employment dates provided by the Petitioner and

Beneficiary in the dd/mm/yr format. As additional proof of the Beneficiary's claimed employment by the U.S. consulting company, the Petitioner submitted copies of payroll records and an IRS Form W-2, Wage and Tax Statement, for 2008.

In addition, the Petitioner submitted another letter from the Indian college. Pursuant to 8 C.F.R. § 204.5(g)(1), the new letter describes the Beneficiary's experience. The Petitioner further stated its reliance on experience that the Beneficiary gained with it. The Petitioner asserted that the Beneficiary gained about one year, one month of qualifying experience with it from July 2008 to August 2009 as a programmer analyst, a position that it states substantially differs from the offered job. *See* 20 C.F.R. § 656.17(i)(3)(i) (allowing a labor certification employer to rely on experience that a noncitizen gained with it in a position substantially different than the offered one). The Petitioner contended that - based on its clarification of the Beneficiary's start date at the U.S. consulting company, the college's description of the Beneficiary's job duties, and the additional qualifying experience she gained with the Petitioner - the record demonstrates her possession of at least five years of qualifying experience.

The Director's second NOIR, however, notes additional inconsistencies regarding the Beneficiary's claimed experience at the U.S. consulting company. The Petitioner stated that the Beneficiary provided it with her dates of employment at former employers and that it then asked the prior employers to supply letters confirming her claimed experience. But the letter from the U.S. consulting company, which states that the company began employing the Beneficiary in January 2007, is dated more than a year before the August 2009 filing of the labor certification application. The letter's issuance far before the application's filing cast doubt on the Petitioner's claims that it contacted the company before preparing the application and that the company's letter misstates the Beneficiary's start date based on the dd/mm/yr format. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies with independent, objective evidence).

The second NOIR also notes inconsistencies in the Beneficiary's end date of employment with the U.S. consulting company. The labor certification and the company's letter state the termination of her employment at the company in July 2008. But, in her affidavit and on her Form G-325A, the Beneficiary stated that she worked for the company until September 2008. The unresolved discrepancy cast additional doubt on the Beneficiary's claimed, qualifying experience at the U.S. consulting company. *See Matter of Ho*, 19 I&N Dec. at 591.

Because of the foregoing inconsistencies, the record at the time of the second NOIR's issuance did not demonstrate the Beneficiary's claimed, qualifying experience with the U.S. consulting company from October 2007 to July 2008. The Beneficiary's other, documented experience totaled less than the requisite five years. Thus, the NOIR's unexplained and unrebutted allegations would have warranted the petition's denial.

Based on insufficient evidence of the Beneficiary's qualifying experience for the offered position and the requested immigrant visa classification, the Director properly issued the NOIRs. Thus, unless the Petitioner demonstrates that the Act otherwise bars revocation of the petition's approval, we will affirm the Director's decision.

III. THE EFFECT OF PORTABILITY ON THE REVOCATION

The Petitioner argues that, because the Beneficiary properly ported to another job under section 204(j) of the Act, USCIS cannot revoke her petition's approval. The Petitioner contends that "porting . . . trumps USCIS'[] discretionary I-140 revocation."

The portability provision states that a petition for a beneficiary who has an adjustment of status application that has remained unadjudicated for at least 180 days "shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed." Section 204(j) of the Act. The Petitioner appears to contend that USCIS cannot revoke the approval of the Beneficiary's petition because she properly ported and thus, under section 204(j), her petition "shall remain valid."

The Petitioner's reasoning, however, is flawed. In its broader context, the portability provision states that a petition "shall remain valid *with respect to a new job*." Section 204(j) of the Act (emphasis added). The provision does not indicate "that the petition shall forevermore remain valid." *Herrera v. USCIS*, 571 F.3d 881, 887 (9th Cir. 2009).

Moreover, "in order for a petition to 'remain' valid, it must have been valid from the start." *Id.* In revoking the approval of the Beneficiary's petition, USCIS found that the Agency should not have approved the filing. Thus, "the petition was not, and has never been, valid." *Id.*; *see also Matter of Al Wazzan*, 25 I&N Dec. 359, 367 (AAO 2010) (holding that, to be "valid" under section 204(j) of the Act, a petition must have been "approved" by a USCIS officer and filed for a beneficiary "entitled" to the requested classification).

In addition, the title of the portability provision plainly states Congress's enactment of the measure to grant "Job Flexibility for Long Delayed Applicants for Adjustment of Status." Section 204(j) of the Act. If Congress had intended the provision to limit USCIS' ability to revoke petitions, the U.S. legislature could have easily stated so in the provision or in the revocation measure at section 205 of the Act. *Herrera v. USCIS*, 571 F.3d at 888.

Further, the Petitioner's reading of the portability provision would bestow unintended benefits on portability-eligible beneficiaries. The company's interpretation of section 204(j) of the Act would allow revocations of petitions for beneficiaries with long-pending adjustment applications who have not changed jobs, while barring petition revocations for those who have switched jobs. "Nothing in the legislative history, the statutory text, or common sense suggests that Congress intended [adjustment] applicants to have the ability, simply by changing jobs, to shield from revocation the agency's erroneous previous approval of an I–140 petition." *Id.*

For the foregoing reasons, the Beneficiary's change to a new job under section 204(j) of the Act does not bar revocation of her petition's approval. The Petitioner's argument is unpersuasive.

IV. CONCLUSION

Based on insufficient evidence of the Beneficiary's qualifying experience for the offered position and the requested immigrant visa petition, the Director properly issued the NOIRs. Also, the Beneficiary's port to another job under the Act did not shield her petition's approval from revocation.

ORDER: The appeal is dismissed.